

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROGER SUNDBERG,
Petitioner,

v.

BEN CURRY, warden,
Respondent.

No. C 08-2709 SI (pr)

**ORDER DENYING HABEAS
PETITION**

INTRODUCTION

Roger Sundberg, an inmate at the Correctional Training Facility in Soledad, filed this pro se action seeking a writ of habeas corpus under 28 U.S.C. § 2254. This matter is now before the court for consideration of the merits of the pro se habeas petition. For the reasons discussed below, the petition will be denied.

BACKGROUND

Sundberg was convicted upon a guilty plea in Los Angeles County Superior Court of second degree murder with an enhancement for use of a firearm in the offense. He was sentenced on February 24, 1988 to 17 years to life in prison. His habeas petition does not challenge his conviction but instead challenges a June 7, 2006 decision by the Board of Parole Hearings ("BPH") that had found him suitable for parole. The 2006 hearing was Sundberg's fifth parole hearing, and was conducted at a time when he was more than 18 calendar years into his life sentence.

1 The BPH identified the circumstances of the commitment offense as the primary reason
2 for the determination that Sundberg was not suitable for parole and would pose an unreasonable
3 risk of danger to society or a threat to public safety if released from prison. Petition, Exh. 3
4 (reporter's transcript of June 7, 2006 BPH hearing (hereinafter "RT")) at 106-07. The BPH also
5 noted that, in the next year, Sundberg needed to take care of certain deficiencies in his parole
6 plans; he needed to figure out where he would be able to attend AA meetings, what he would
7 do for transportation, and how he would address his needs for mental health medications and
8 therapy in light of his documented major depression. RT 108-111. The specifics regarding the
9 crime and the circumstances supporting the finding of unsuitability are described in the
10 Discussion section later in this order.

11 Sundberg sought relief in the California courts. He filed a habeas petition in the Los
12 Angeles County Superior Court, where it was denied in a reasoned order. Petition, Exh. R. The
13 California Court of Appeal denied his habeas petition in a 3-sentence order. Petition, Exh. S.
14 The California Supreme Court summarily denied his habeas petition. Petition, Exh. T.

15 Sundberg then filed his federal petition for a writ of habeas corpus. The court found
16 cognizable due process claims for insufficient evidence to support the decision and breach of the
17 plea agreement. Respondent filed an answer and Sundberg filed a traverse. The matter is now
18 ready for a decision.

19 20 **JURISDICTION AND VENUE**

21 This court has subject matter jurisdiction over this habeas action for relief under 28
22 U.S.C. § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the challenged
23 action concerns the execution of the sentence of a prisoner housed in a prison in Monterey
24 County, within this judicial district. 28 U.S.C. §§ 84, 2241(d).

25 26 **EXHAUSTION**

27 Prisoners in state custody who wish to challenge collaterally in federal habeas
28 proceedings either the fact or length of their confinement are required first to exhaust state

1 judicial remedies, either on direct appeal or through collateral proceedings, by presenting the
2 highest state court available with a fair opportunity to rule on the merits of each and every claim
3 they seek to raise in federal court. See 28 U.S.C. § 2254(b), (c). The parties do not dispute that
4 state court remedies were exhausted for the claims asserted in the petition.

6 STANDARD OF REVIEW

7 This court may entertain a petition for writ of habeas corpus "in behalf of a person in
8 custody pursuant to the judgment of a State court only on the ground that he is in custody in
9 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The
10 petition may not be granted with respect to any claim that was adjudicated on the merits in state
11 court unless the state court's adjudication of the claim: "(1) resulted in a decision that was
12 contrary to, or involved an unreasonable application of, clearly established Federal law, as
13 determined by the Supreme Court of the United States; or (2) resulted in a decision that was
14 based on an unreasonable determination of the facts in light of the evidence presented in the
15 State court proceeding." 28 U.S.C. § 2254(d); see Williams (Terry) v. Taylor, 529 U.S. 362,
16 409-13 (2000). Section 2254(d) applies to a habeas petition from a state prisoner challenging
17 the denial of parole. See Sass v. California Board of Prison Terms, 461 F.3d 1123, 1126-27 (9th
18 Cir. 2006).

20 DISCUSSION

21 A. Due Process Requires That Some Evidence Support a Parole Denial

22 A California prisoner with a sentence of a term of life with the possibility of parole has
23 a protected liberty interest in release on parole and therefore a right to due process in the parole
24 suitability proceedings. See Sass, 461 F.3d at 1127-28; Board of Pardons v. Allen, 482 U.S.
25 369 (1987); Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1 (1979); Cal.
26 Penal Code § 3041(b).

27 A parole board's decision satisfies the requirements of due process if "some evidence"
28 supports the decision. Sass, 461 F.3d at 1128-29 (adopting some evidence standard for

1 disciplinary hearings outlined in Superintendent v. Hill, 472 U.S. 445, 454-55 (1985)). "To
2 determine whether the some evidence standard is met 'does not require examination of the entire
3 record, independent assessment of the credibility of witnesses, or weighing of the evidence.
4 Instead, the relevant question is whether there is any evidence in the record that could support
5 the conclusion reached'" by the BPH. Sass, 461 F.3d at 1128 (quoting Superintendent v. Hill,
6 472 U.S. at 455-56). The "some evidence standard is minimal, and assures that 'the record is not
7 so devoid of evidence that the findings of the . . . board were without support or otherwise
8 arbitrary.'" Id. at 1129 (quoting Superintendent v. Hill, 472 U.S. at 457). The some evidence
9 standard of Superintendent v. Hill is clearly established law in the parole context for purposes
10 of § 2254(d). Sass, 461 F.3d at 1129. As a matter of state law, the decision must also satisfy
11 the "some evidence" standard of review. See In re Lawrence, 44 Cal. 4th 1181, 1191 (Cal. 2008)
12 (state court "standard of review properly is characterized as whether 'some evidence' supports
13 the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous");
14 In re Rosenkrantz, 29 Cal. 4th 616, 676-77 (Cal. 2002), cert. denied, 538 U.S. 980 (2003).

15 A critical issue in parole denial cases concerns the parole authority's use of evidence
16 about the commitment offense that led to the conviction. Three Ninth Circuit cases provide the
17 guideposts for applying the Superintendent v. Hill some evidence standard on this point: Biggs
18 v. Terhune, 334 F.3d 910 (9th Cir. 2003), Sass, 461 F.3d 1123, and Irons v. Carey, 505 F.3d 846
19 (9th Cir. 2007).¹ Biggs explained that the value of the criminal offense fades over time as a
20 predictor of parole suitability: "The Parole Board's decision is one of 'equity' and requires a
21 careful balancing and assessment of the factors considered. . . . A continued reliance in the
22 future on an unchanging factor, the circumstance of the offense and conduct prior to
23 imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and could
24 result in a due process violation." Biggs, 334 F.3d at 916-17. Biggs upheld the initial denial of
25 a parole release date based solely on the nature of the crime and the prisoner's conduct before
26

27 ¹En banc review is now pending in a fourth case regarding the some evidence standard,
28 Hayward v. Marshall, 512 F.3d 536 (9th Cir.), reh'g en banc granted, 527 F.3d 797 (9th Cir.
2008). The order granting en banc review states that the panel opinion is of no precedential
value.

1 incarceration, but cautioned that “[o]ver time . . . , should Biggs continue to demonstrate
2 exemplary behavior and evidence of rehabilitation, denying him a parole date simply because
3 of the nature of Biggs’ offense and prior conduct would raise serious questions involving his
4 liberty interest in parole.” Id. at 916. Next came Sass, which criticized the Biggs statements as
5 improper and beyond the scope of the dispute before the court: “Under AEDPA it is not our
6 function to speculate about how future parole hearings could proceed.” Sass, 461 F.3d at 1129.
7 Sass determined that the parole board is not precluded from relying on unchanging factors such
8 as the circumstances of the commitment offense or the petitioner’s pre-offense behavior in
9 determining parole suitability. See id. (commitment offenses in combination with prior offenses
10 provided some evidence to support denial of parole at subsequent parole consideration hearing).
11 Sass also put to rest any idea from Biggs that the commitment crime and pre-offense behavior
12 only support the initial denial of parole. Irons determined that due process was not violated by
13 the use of the commitment offense and pre-offense criminality to deny parole for a prisoner 16
14 years into his 17-to-life sentence. Irons emphasized that all three cases (Irons, Sass and Biggs)
15 in which the court had “held that a parole board’s decision to deem a prisoner unsuitable for
16 parole solely on the basis of his commitment offense comports with due process, the decision
17 was made before the inmate had served the minimum number of years required by his sentence.”
18 Irons, 505 F.3d at 853.² Interpreting this statement from Irons to suggest that the offense can
19 only be relied on until the minimum number of years has been reached would suffer the same
20 problem that Sass identified in Biggs: it is not the holding of the case. The dicta in Biggs and
21 Irons are speculative and do not determine when a denial of parole based solely upon the
22 commitment offense or pre-offense behavior violates due process. Neither logic nor Irons
23 compel a decision that such reliance must cease when the prisoner reaches the minimum number
24 of years in his sentence, such as the fifteenth year of a 15-to-life sentence.

25 The upshot of these three cases is that the BPH can look at immutable events, such as the

27 ²Interestingly, Irons was referring the actual number of years the inmate had been in
28 prison and not the fictional number of years based on reductions for time credits. In Irons, the
inmate had been in custody 16 years on his 17-to-life sentence, having been convicted in 1985
and challenging a 2001 parole decision.

1 nature of the conviction offense and pre-conviction criminality, to predict that the prisoner is not
2 currently suitable for parole even after the initial denial (Sass), but the weight to be attributed
3 to those immutable events should decrease over time as a predictor of future dangerousness as
4 the years pass and the prisoner demonstrates favorable behavior (Biggs and Irons). Sass did not
5 dispute the principle that, other things being equal, a crime committed 50 years ago is less
6 probative of a prisoner's current dangerousness than one committed 10 years ago. Not only does
7 the passage of time in prison count for something, exemplary behavior and rehabilitation in
8 prison count for something according to Biggs and Irons. Superintendent v. Hill's standard
9 might be quite low, but it does require that the decision not be arbitrary, and reliance on only the
10 facts of the crime might eventually make for an arbitrary decision.³

11 What little guidance has come from the Supreme Court suggests that judicial review
12 should be extremely deferential to the original decision-maker in the parole context. In addition
13 to the very low evidentiary standard that Superintendent v. Hill imposes, other Supreme Court
14 comments suggest that the judiciary should be quite mindful of the subjective and predictive
15 nature of a parole board's decision. See Greenholtz, 442 U.S. at 13. "No ideal, error-free way
16 to make parole-release decisions has been developed; the whole question has been and will
17 continue to be the subject of experimentation involving analysis of psychological factors
18 combined with fact evaluation guided by the practical experience of decisionmakers in
19 predicting future behavior. Our system of federalism encourages this state experimentation."
20 Id.; see also id. at 8.

21 Past criminal conduct is not some arbitrary factor like eye color that has nothing to do
22

23
24 ³The California Supreme Court recently weighed in on the use of the commitment crime
25 to deny parole in the companion cases of In re Lawrence, 44 Cal. 4th 1181 (Cal. 2008), and In
26 re Shaputis, 44 Cal. 4th 1241 (Cal. 2008). The court explained that where "evidence of the
27 inmate's rehabilitation and suitability for parole under the governing statutes and regulations is
28 overwhelming, the only evidence related to unsuitability is the gravity of the commitment
offense, and that offense is both temporally remote and mitigated by circumstances indicating
the conduct is unlikely to recur, the immutable circumstance that the commitment offense
involved aggravated conduct does not provide 'some evidence' inevitably supporting the ultimate
decision that the inmate remains a threat to public safety." Lawrence, 44 Cal. 4th at 1191
(emphasis in source). Applying that rule, the court determined that there was not some evidence
to deny parole in Lawrence but that there was some evidence to deny parole in Shaputis.

1 with present dangerousness. Recidivism concerns are genuine. See Ewing v. California, 538
2 U.S. 11, 26 (2003) (O'Connor J.) (noting a report stating that over 60% of violent offenders were
3 arrested again within three years of their release). California's parole scheme does not offend
4 due process by allowing the BPH to predict that an inmate presents a present danger based on
5 a crime he committed many years ago.

6 Having determined that there is a due process right, and that some evidence is the
7 evidentiary standard for judicial review, the next step is to look to state law because that sets the
8 criteria to which the some evidence standard applies. One must look to state law to answer the
9 question, "'some evidence' of what?"

11 B. State Law Standards For Parole For Murderers In California

12 California uses indeterminate sentences for most non-capital murderers, with the term
13 being life imprisonment and parole eligibility after a certain minimum number of years. A first
14 degree murder conviction yields a minimum term of 25 years to life and a second degree murder
15 conviction yields a term of 15 years to life imprisonment. See In re Dannenberg, 34 Cal. 4th
16 1061, 1078 (Cal.), cert. denied, 126 S. Ct. 92 (2005); Cal. Penal Code § 190. The upshot of
17 California's parole scheme described below is that a release date normally must be set unless
18 various factors exist, but the "unless" qualifier is substantial.

19 A BPH panel meets with an inmate one year before the prisoner's minimum eligible
20 release date "and shall normally set a parole release date. . . . The release date shall be set in a
21 manner that will provide uniform terms for offenses of similar gravity and magnitude in respect
22 to their threat to the public, and that will comply with the sentencing rules that the Judicial
23 Council may issue and any sentencing information relevant to the setting of parole release
24 dates." Cal. Penal Code § 3041(a). Significantly, that statute also provides that the panel "shall
25 set a release date unless it determines that the gravity of the current convicted offense or
26 offenses, or the timing and gravity of current or past convicted offense or offenses, is such that
27 consideration of the public safety requires a more lengthy period of incarceration for this
28 individual, and that a parole date, therefore, cannot be fixed at this meeting." Cal. Penal Code

1 § 3041(b). California law adds a layer of review by giving the Governor the power to review
2 the BPH decision and to affirm, modify or reverse the decision but only on the basis of the same
3 factors the parole authority is required to consider. See Cal. Penal Code § 3041.2; Cal. Const.
4 art. V, § 8(b).

5 One of the implementing regulations, 15 Cal. Code Regs. § 2401, provides: "A parole
6 date shall be denied if the prisoner is found unsuitable for parole under Section 2402(c). A
7 parole date shall be set if the prisoner is found suitable for parole under Section 2402(d). A
8 parole date set under this article shall be set in a manner that provides uniform terms for offenses
9 of similar gravity and magnitude with respect to the threat to the public."⁴ The regulation also
10 provides that "[t]he panel shall first determine whether the life prisoner is suitable for release on
11 parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and
12 denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of
13 danger to society if released from prison." 15 Cal. Code Regs. § 2402(a). The panel may
14 consider all relevant and reliable information available to it. 15 Cal. Code Regs. § 2402(b).

15 The regulations contain a matrix of suggested base terms for several categories of crimes.
16 See 15 Cal. Code Regs. § 2403. For example, for second degree murders, the matrix of base
17 terms ranges from the low of 15, 16, or 17 years to a high of 19, 20, or 21 years, depending on
18 some of the facts of the crime. Some prisoners estimate their time to serve based only on the
19 matrix. However, going straight to the matrix to calculate the sentence puts the cart before the
20 horse because it ignores critical language in the relevant statute and regulations that requires him
21 first to be found suitable for parole. The statutory scheme places individual suitability for parole
22

23
24 ⁴ The listed circumstances tending to show unsuitability for parole are the nature of the
25 commitment offense, i.e., whether the prisoner committed the offense in "an especially heinous,
26 atrocious or cruel manner;" the prisoner has a previous record of violence; the prisoner has an
27 unstable social history, the prisoner previously engaged in a sadistic sexual offense, the prisoner
28 has a lengthy history of severe mental problems related to the offense; and negative institutional
behavior. 15 Cal. Code Regs. § 2402(c). The listed circumstances tending to show suitability
for parole are the absence of a juvenile record, stable social history, signs of remorse, a stressful
motivation for the crime, whether the prisoner suffered from battered woman's syndrome, lack
of criminal history, the present age reduces the probability of recidivism, the prisoner has made
realistic plans for release or developed marketable skills, and positive institutional behavior. 15
Cal. Code Regs. § 2402(d).

1 above a prisoner's expectancy in early setting of a fixed date designed to ensure term uniformity.
2 Dannenberg, 34 Cal. 4th at 1070-71. Under state law, the matrix is not reached unless and until
3 the prisoner is found suitable for parole. Id. at 1070-71; 15 Cal. Code Regs. § 2403(a) ("[t]he
4 panel shall set a base term for each life prisoner who is found suitable for parole").

5 The "Penal Code and corresponding regulations establish that the fundamental
6 consideration in parole decisions is public safety . . . [T]he core determination of 'public safety
7 under the statute and corresponding regulations involves an assessment of an inmate's current
8 dangerousness." Lawrence, 44 Cal. 4th at 1205 (emphasis in source).⁵

9 10 C. Some Evidence Supports The BPH's Decision

11 1. The BPH's Decision And State Court Review

12 The BPH identified the circumstances of the murder as the primary reason for its
13 determination that Sundberg was not suitable for parole. The Life Prisoner Evaluation Report
14 summarized the facts of the murder:

15 The victim was estranged from his wife, Pamela Summers and during their marital
16 difficulties, his wife became involved with the prisoner. At first it was just a matter of
17 talking over her problems but as time went on, they became romantically involved. The
18 victim was physically abusive to her, so when they separated, she had a restraining order
19 placed against him. During the separation, the victim had no place to stay so the victim's
20 wife allowed him to stay in the garage at her residence. While the victim was staying in
21 the garage, he still had the freedom to go in and out of the house as well as in the garage
22 and this irritated the prisoner. On the night of the crime, Sundberg saw the victim
23 moving about the garage and back and forth into the house. The prisoner's house was
24 located next to the victim's residence. The prisoner's rage escalated to a point where he
25 took a pistol inside his house and went to the driveway next door and shot the victim four
26 times. The victim went inside his wife's house and staggered toward the bedroom. The
27 prisoner followed him with the pistol and occasionally struck the victim. At this point,
28 the victim's [11-year old] son, who was in the house, grabbed a plastic baseball bat and

24 ⁵The California Supreme Court's determination in Lawrence that state law requires the
25 parole authority to determine whether the inmate is unsuitable for parole because he currently
26 is dangerous is binding in this federal habeas action. See Hicks v. Feiock, 485 U.S. 624, 629-30
27 (1988). However, Lawrence does not govern this court's analysis in every respect. This court
28 is not bound by the discussion in Lawrence (see footnote 4, supra) as to the evaluation of the
commitment offense in determining whether the parole applicant currently is dangerous. As to
that point, Lawrence is persuasive authority, while the Ninth Circuit's holdings in Sass, Biggs,
and Irons are binding authority. Also, Lawrence's determination that "some evidence" is the
proper standard of judicial review, 44 Cal. 4th at 1211-12, does not bind this court because it is
a state court decision and, in any event, was not determining the standard required by the federal
constitution.

1 tried to stop Sundberg from killing his father. The son was unable to stop the prisoner.
2 Sundberg kept on following the victim into the bathroom where the victim fell into the
3 bathtub. At this point they argued some more and Sundberg shot the victim twice in the
 head. The victim's son observed the killing. The prisoner then left the victim's house.
 Before the police arrived to arrest him, he tried to shoot himself in the head.

4 Petition, Exh. G, Life Prisoner Evaluation Report, p. 1.

5 The BPH's decision stated that the murder "was carried out in an especially cruel and
6 callous manner. A boy watched his father die. It was indicated that you shot, or fired 14 times.
7 Fortunately 11 missed. The gun was reloaded twice. The offense was carried out in a manner
8 which demonstrates exceptionally callous disregard for human suffering, and – and to be
9 truthful, the motive was very trivial for the actions." RT 107.

10 The BPH also had concerns about certain parts of Sundberg's parole plans. The BPH
11 asked him to arrange for alternative housing in case his plan to live with his mother did not
12 materialize. The BPH also asked him to make greater efforts to try to line up employment.
13 Sundberg had taken some steps to seek employment before his last parole hearing, but had met
14 with almost no success. The BPH recognized that he had very marketable skills in computer-
15 related work -- as Sundberg had been trained in data processing and had been trained and
16 worked as a computer technician – but encouraged him to explore employment opportunities that
17 might exist. A commissioner said, "you don't have to have a job to parole, you have to have
18 made an attempt," and therefore Sundberg was advised to document his efforts to find a job. RT
19 112. The BPH also noted that, because of his seizures for which he took anti-seizure
20 medications, he might not be able to drive and needed to explore transportation options in his
21 intended place of parole. The BPH also suggested he find out information about where AA
22 meetings would take place, because he had been in AA throughout his imprisonment and would
23 be in AA when he left prison. (Sundberg had not consumed alcohol while in prison, but had
24 abused it before his incarceration and even said he used it to self-medicate to deal with his
25 depression. See Petition, Exh. C (9/17/04 psychological evaluation), p. 2.) Although the
26 foregoing are routine problems that an inmate often faces, the BPH also was concerned about
27 mental health needs for this particular inmate.

28 The BPH told Sundberg he needed to make arrangements to obtain his mental health

1 medications and mental health care after prison. RT 110-111. These particular concerns are
2 serious ones, and have ample support in the record. After Sundberg had killed his neighbor, he
3 shot himself in the head; the bullet wound to his head led to mild seizures for which he still took
4 medication. Id. Additionally, Sundberg had been diagnosed with major depression, for which
5 he took medications and for which he was in some sort of therapy apparently for the entire 18
6 years he had been in prison. See id. at 2-3. The psychological evaluation was overall very
7 positive but did note that the “most significant risk factor for this inmate which would be a
8 precursor to violence would be finding himself in circumstances of extreme stress.” Id. at 4.
9 The psychologist stated that Sundberg suffers “from a psychiatric disorder which is well
10 controlled with medications. I believe he could benefit from psychiatric treatment following his
11 parole.” Id. The psychologist also noted that, since Sundberg had acknowledged some abuse of
12 alcohol and drugs, he would recommend abstinence from drugs and alcohol, monitoring for
13 substance abuse, and mandatory attendance at self-help groups, such as AA or NA. Id.
14 Sundberg stated at the hearing that he had not received treatment for depression before his
15 incarceration, and that he had a family history of depression. Ominously, he saw depression in
16 his future that might make him suicidal but he thought he could avoid harming anyone because
17 he had learned coping skills. See RT 103-104.

18 Other than these concerns, the BPH was very favorably impressed with this inmate. He
19 had been disciplinary-free for his entire incarceration, had been industrious and helpful in
20 computer-related matters, had excellent work reviews, had been taking college-level courses
21 with a purpose, and had participated in numerous self-help and therapy programs, had taken a
22 leadership role in some of these groups, had tutored other inmates, and was considered to have
23 a positive attitude. One commissioner observed that he had seen few inmates like Sundberg
24 “who have done just about everything that they can possibly do with the hopes of bettering
25 themselves.” RT 114.

26 The Los Angeles County Superior Court upheld the decision in a reasoned order. The
27 court identified the “some evidence” standard for judicial review of the parole decision. See
28 Petition, Exh. R, p. 1. After reviewing the evidence related to the crime, the court explained:

1 The Court finds that there is some evidence to support the Board's findings that the
2 Petitioner's commitment offense demonstrated an exceptionally callous disregard for
3 human suffering and that his motive was very trivial in relation to the offense. Cal. Code
4 Regs., tit. 15, § 2402, subds. (c)(1)(D) and (c)(1)(E). After shooting the victim once in
5 the garage, the Petitioner continued to pursue him, hit him with the gun and his fists, and
6 then shot him again several times. This demonstrated an exceptionally callous disregard
7 for the victim's suffering, as it was more violent than is ordinarily shown in the
8 commission of murder in the second degree. [Citation.] Additionally, the Petitioner's
9 motive was very trivial because, although the victim had previously threatened him and
10 his wife and had previously been abusive to Pamela, he did not pose a threat to anyone
11 and did not provoke the Petitioner in any way at the time of the offense. The Petitioner
12 became enraged merely by the sight of the victim moving between the garage and the
13 house. This was a very trivial motive for chasing him and shooting him multiple times.

8 Petition, Exh. R, ¶. 1-2. The court also noted that the BPH's consideration of some deficiencies
9 in Sundberg's parole plan was permissible under the regulation. "While these factors may not
10 justify a finding of unsuitability, the Board may consider them." Id. at 2. The court also stated
11 that the BPH had some evidence to support its determination that Sundberg would pose an
12 unreasonable threat to public safety because of the nature of his commitment offense,
13 notwithstanding all of Sundberg's progress and accomplishments in prison. Id.

14 15 2. Analysis Of Federal Claim

16 The Los Angeles County Superior Court correctly identified the "some evidence"
17 standard as the applicable standard for judicial review, as evidenced by its citation to In re
18 Rosenkrantz, 29 Cal. 4th 616 (Cal. 2002), which had cited and adopted the Superintendent v.
19 Hill some evidence standard as the proper standard for judicial review of evidentiary sufficiency
20 for administrative cases. See Rosenkrantz, 29 Cal. 4th at 665-67. Because the Los Angeles
21 County Superior Court's decision is the last reasoned decision, that is the decision to which
22 § 2254(d) applies. See Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991); Barker v. Fleming,
23 423 F.3d 1085, 1091-92 (9th Cir. 2005), cert. denied, 126 S. Ct. 2041 (2006). The state court
24 did not unreasonably apply Superintendent v. Hill.

25 The BPH had considered circumstances and factors proper under California law. A
26 circumstance tending to indicate unsuitability for parole is that "the prisoner committed the
27 offense in an especially heinous, atrocious or cruel manner." 15 Cal. Code Regs. § 2402(c)(1).
28 The BPH's ultimate conclusion was cast in terms of the requirement of California law, i.e., that

1 Sundberg “would pose an unreasonable risk of danger to society or a threat to public safety if
2 released from prison.” RT 106; see Lawrence, 44 Cal. 4th at 1191.

3 Notwithstanding all the positive factors for Sundberg, the BPH believed the criminal
4 offense committed in 1988 that led to Sundberg’s imprisonment was so bad that it still had
5 enough weight to show that he posed an unreasonable risk of danger to society if released from
6 prison in 2006. The BPH did not act arbitrarily or capriciously or without some evidentiary
7 support in determining that the circumstances of the crime committed showed that Sundberg
8 currently presented an unreasonable risk of danger to society if released, some 18 years into his
9 17-to-life sentence. As the state court explained, Sundberg became enraged at the mere sight
10 of the victim, at a time when the victim was not posing a threat to anyone or doing anything to
11 provoke Sundberg. Sundberg pursued the victim through the residence while shooting at him
12 14 times during the course of which he reloaded his weapon and pushed aside the victim's 11-
13 year old son who tried to protect his father. This murder was, as the state court observed, more
14 violent than the usual second degree murder. Additionally, the BPH properly considered parole
15 plans in evaluating Sundberg. Most notably, the absence of a plan to address Sundberg's
16 significant mental health needs upon release -- especially when he attributed the murder in large
17 part to stress -- gave added support to the conclusion that his release would pose an unreasonable
18 risk of danger to society. Bearing in mind that the court's chore is to consider not whether some
19 evidence supports the reasons, but whether some evidence supports the conclusion that
20 Sundberg’s release unreasonably endangers public safety, this court concludes that the Los
21 Angeles County Superior Court's rejection of Sundberg’s insufficient evidence claim was not
22 contrary to or an unreasonable application of the Superintendent v. Hill some evidence standard.
23 Sundberg is not entitled to the writ on this claim.

24
25 D. Breach Of Plea Agreement Claim

26 Sundberg claims that the BPH’s denial of parole resulted in a breach of the plea
27 agreement. He reasons that, when he pled guilty and was sentenced, “the court noted the
28 mitigating factors of his crime. Neither the court nor the prosecution raised aggravating factors,

1 leading Petitioner to reasonably understand that, barring misconduct on his part, his uniform
2 term would be set according to the matrix for second degree murder, at his first parole hearing
3 as required by the Penal Code sections then became part of his plea contract, when it was
4 accepted by the court and he was sentenced.” Petition, p. 36. In his traverse, Sundberg argues
5 that the BPH’s decision requires him to serve a term beyond the matrix for second degree
6 murder, which deprives “him of the only benefit he could have received from his plea agreement
7 to a lesser offense: a reduced term of imprisonment.” Traverse, p. 13.

8 The Los Angeles County Superior Court denied the breach-of-plea-agreement claim.
9 That court construed Sundberg's claim to be a “contention that the District Attorney’s opposition
10 to his parole violated the terms of his plea agreement. The Petitioner agreed to a bargain that
11 subjected him to a life sentence. An indeterminate sentence is, in legal effect, a sentence for the
12 maximum term unless the parole authority acts to fix a shorter term. (Citations.) The District
13 Attorney must be given an opportunity to oppose parole under Penal Code § 3402.” Petition,
14 Exh. R, ¶. 3-4.⁶

15 “Plea agreements are contractual in nature and are measured by contract law standards.”
16 Brown v. Poole, 337 F.3d 1155, 1159 (9th Cir. 2003) (quoting United States v. De la Fuente,
17 8 F.3d 1333, 1337 (9th Cir. 1993)). Although a criminal defendant has a due process right to
18 enforce the terms of a plea agreement, see Santobello v. New York, 404 U.S. 257, 261-62
19 (1971), there is no evidence that Sundberg’s subjective expectations about how parole would be
20 decided were part of the plea agreement. The court notes that Sundberg did not submit his plea
21 colloquy, but only the transcript of the sentencing proceeding, which was upon a negotiated
22 disposition. See Petition, Exh. B. At sentencing, the court made no findings of aggravating and
23 mitigating circumstances, but simply observed that, regardless of any mitigating circumstances
24 “that very assuredly can be asserted on behalf of the defendant,” the law allowed no discretion
25 in the sentence and the sentence had to be 17 years to life in prison. See id. at 3. Any
26 aggravating factors, like any mitigating factors, wouldn’t have made a difference: Sundberg had

27
28 ⁶This court does not apply §2254(d) to the superior court’s reasoned decision because that court did not decide the issue presented to this court.


1 to receive that 17-to-life sentence for second degree murder with a firearm. The sentencing
2 transcript does not mention how parole consideration would occur. Sundberg provides no
3 evidence that there was any promise that he would be released at any particular time absent
4 further criminal activity or misbehavior. The possibility of parole does not mean a guarantee of
5 parole; under state law (as it existed when he was sentenced and as it exists now), the inmate
6 must be found suitable before his term and release date are set. He did receive a lesser sentence,
7 in that a first degree murder conviction would have resulted in a life sentence with a minimum
8 of 25 years instead of a minimum of 15 years. Sundberg has received the parole considerations
9 to which he was entitled under his sentence. Sundberg's claim that his plea agreement was
10 breached in violation of his right to due process fails.

11
12 **CONCLUSION**

13 For the foregoing reasons, the petition is denied on the merits. The clerk shall close the
14 file.

15 IT IS SO ORDERED.

16 DATED: March 8, 2010



SUSAN ILLSTON
United States District Judge